No. 20,094

United States Court of Appeals

For the Ninth Circuit

Eastland Construction Co., Inc.,
Appellant,
vs.
Keasbey and Mattison Company,
Appellee.

APPELLANT'S REPLY BRIEF

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Table of Authorities Cited

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Relying in the final analysis, upon a hypertechnical interpretation of the so-called "present tense" language of Section 12 of the Clayton Act (15 U.S.C. 22), most of appellee's other arguments in favor of affirmance are irrelevant. Appellee spends a considerable amount of time pointing out that "it was not an inhabitant of" or "found within" or "not in fact transacting business in" the Northern District of California at the time suit was brought. All of these facts counsel for appellant conceded in open Court in argument before the District Judge and simply are not in issue here. Moreover, the almost passionate rehash of the criminal and civil litigation with the Government is beside the point. Accusations that the Government engaged in a process of "almost continual harassment" and that the litigation instituted by the

grand jury and/or Department of Justice was "spurious", tend only to obscure the importance of the legal issue presented for determination by this Court.[1]

In short, appellee's argument boils down to this: That it has been acquitted of criminal charges levied by the Government and has been dismissed from the companion civil suit on the ground of mootness. This having been accomplished, K & M should not be subjected to further litigation, particularly in a forum where it does not maintain the headquarters for its corporate shell. This argument is neither appealing when approached from the standpoint of reason nor is it consistent with the overall design of Congress in encouraging enforcement of the antitrust laws by means of private litigation.

Appellee has chosen to ignore the logical argument that Congress could not have intended, on the one hand, to encourage private litigants to await the outcome of Government litigation and penalize potential antitrust plaintiffs if they wait by requiring these plaintiffs (usually small companies) to chase the alleged corporate violators across the country in order to prosecute their claims. Indeed, appellee makes no meaningful argument

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[1] An examination of the record in the criminal case hardly supports the assertions that the Government engaged in harassment or that the litigation was spurious. Much of the Government's strongest evidence was excluded by the District Court on asserted constitutional grounds which could not possibly affect the admissibility of the evidence in this civil proceeding. Needless to point out the burden of proof standards are wholly different and the District Judge's comments in the criminal case that the Government had not even met the burden of proof test in a civil case must be read in the light of the fact that substantial and extremely important segments of the Government's proposed proof were never admitted into evidence.

that the procedural statutes governing the conduct of treble damage litigation must be read as a harmonizing and interlacing text rather than literally and individually.

There is no question but that the tolling provisions of Section 5 of the Clayton Act (15 U.S.C. 16(b)) deal with the time when an antitrust case may be instituted. But, in extending that time for the mutual benefit of prospective plaintiffs and actual defendants alike, Congress could not have intended to make prospective plaintiffs give up their right, granted to them expressly, to commence the litigation at a place where the alleged unlawful activities adversely affected the plaintiff—a forum in which defendant was transacting business at the time of the alleged unlawful activities. And appellee is unable to point to a single case in any Court of Appeals or in the Supreme Court which approves its view that a literal and isolated interpretation of Section 12 of the Clayton Act (15 U.S.C. 22) is required.

Characterizing the "hit and run" language of *U.S. v. Scophony,* 333 U.S. 795 (1958) as "dictum", appellee implicitly concedes that, despite the "present tense" language of Section 12 of the Clayton Act, the Supreme Court would not tolerate a situation in which the defendant "retreated" or "hit and ran". But appellee argues this is not such a case. We submit that neither the Supreme Court in *Scophony* nor Congress ever contemplated a rule which makes venue turn upon an exhaustive fact analysis of the reason *why* a defendant has retreated from the forum in which an alleged injury occurs. Nowhere have the Supreme Court or the Congress exhibited any concern with the reasons for which a defendant

retreats. What Congress and the Supreme Court were concerned with was the fact of retreat itself. Retreat, for any reason (whether to avoid suit or for legitimate business purposes), has the necessary effect of defeating or delaying the plaintiff's right to prosecute the action.

Moreover, appellee's argument that it should not be required to defend this suit some 3000 miles from its place of business is precisely the argument which the Supreme Court rejected in *Scophony*. For in that case the Supreme Court recognized that a plaintiff of small means would be subjected to the "often insuperable obstacle of resorting to distant forums for redress of wrongs done in their places of business or residence". And in *Scophony* the Supreme Court reiterated that it was unwilling to construe Section 12 in a manner "to bring back the evils it abolished . . . and thus to defeat its policy . . . so as to make another amendment necessary". (333 U.S. 795 at 808, 817.)

The Supreme Court has spoken. In those instances where a burden is involved in commencing or defending antitrust litigation, it is clear that the Court has elected that the defendant—usually a large corporation whose activities ordinarily are much wider in scope than those of the normally localized plaintiff—must bear that burden.

Appellee's argument that reversal of the decision below would frustrate the purposes of the Clayton Act and would "penalize Keasbey and Mattison's decision to liquidate . . ." is but another impassioned plea which assumes that there is "penalty" involved in defending a suit at a place where it clearly could have been brought but for K & M's "retreat". Indeed, there is no penalty

involved here except to plaintiff. The decision below effectively precludes this plaintiff from chasing appellee across the country in order to seek restitution for the overcharges alleged. It thus assists in insulating this defendant from potential civil liability and grants to appellee a privilege which Congress could not conceivably have intended in drafting the procedural framework dealing with the institution and conduct of treble damage litigation.

Appellee has feebly attempted to distinguish *Ross-Bart Port Theatre v. Eagle Lion Films,* 140 F.Supp. 401 (E.D., Va. 1954). Asserting that *Ross-Bart* dealt with the issue of service of process and not venue, defendant cites, out of context, a single sentence at page 403 of the opinion, intending to leave the impression that the subject of improper venue was not at all at issue. But the opinion read in context leaves no doubt that venue was the *key* question presented by the moving party. In the second sentence of the opinion, the District Judge recites that defendant "has moved to quash the process and dismiss the action for lack of venue". Further, in the first paragraph of the opinion, the District Judge notes that

> "the only ground of the motion now is that the defendant was not at the time of the execution of the summons an inhabitant or resident of the Eastern District of Virginia, was not found there, had no agent there, was not transacting business therein and *hence was not subject to suit in this Court and has not been brought here by such service.*" (Emphasis added.)

It is quite clear that *Ross-Bart* stands for the proposition that a defendant need not be transacting business at